U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 April 2006

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In the Matter of:

LODEMA LESTER, widow of
LORIS LESTER, deceased,
Claimant,

v. **Case No.: 2004-BLA-05700**

ROYALTY SMOKELESS COAL CO./
A.T. MASSEY,
Employer/Carrier and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.
……..

Appearances:

John Cline, Esq., Piney View, WV
For Claimant

Christopher M. Hunter, Esq., Jackson Kelly, PLLC, Charleston, WV
For Employer

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a survivor's claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Lodema Lester ("Claimant") on October 9, 2001 based upon the death of her husband Miner Loris J. Lester ("Miner"). The putative responsible operator is Royalty Smokeless Coal Company ("Employer") which is self-insured through A.T. Massey. Although the Miner was receiving benefits at the time of his death, the Claimant is not receiving benefits from the Black Lung Disability Trust Fund based upon this claim.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003, solely for the purposes of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, except as limited below in view of the new evidentiary limitations. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant filed the instant claim on October 9, 2001 based upon the September 30, 2001 death of her husband, Miner Loris J. Lester ("Miner"). (DX 3).[3] On May 19, 2003, Claims Examiner Harry J. McGuire issued a "Schedule for the Submission of Additional Evidence" which stated the preliminary conclusions that the Claimant would not be entitled to benefits if a decision were issued at that time and that the coal mine operator listed (Employer "Royalty Smokeless Coal Company, Acordia Employers Service," "Self-Insured by A.T. Massey") would be the responsible operator liable for the payment of benefits. (DX 47). The parties were given until July 18, 2003 to submit supporting evidence and until August 17, 2003 to submit responsive evidence, subject to extension for good cause shown prior to the expiration of the periods. *Id.* A certified mail receipt postcard reflected that Claimant received this communication on June 9, 2003. (DX 48).

On Friday, August 22, 2003, District Director Stuart C. Glassman, Johnstown, Pennsylvania, issued a "Proposed Decision and Order Denial of Benefits" that determined that the claim for benefits was timely filed and that Claimant was not entitled to benefits based upon the medical issues. (DX 52). A cover letter from Claims Examiner McGuire, addressed to Claimant Lodema Lester, stated the following:

> If you do not agree with the decision as outlined in the Proposed Decision and Order, you must notify this office, in writing, within thirty days of the date of this letter, specifying the points with which you disagree. You may request a revision of the Proposed Decision and Order or you may request a formal hearing before an Administrative Law Judge.

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[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] Director's, Claimant's, and Employer's Exhibits entered into evidence at the March 31, 2005 hearing will be referenced as "DX", "CX", and "EX", respectively, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number. Although the transcript indicates that the hearing was conducted on Wednesday, March 30, 2005, it was actually conducted on Thursday March 31, 2005.

> If you do not take any action within 30 days, the denial will become final. However, you may request modification of this decision if you write to this office within one year from the date that the denial becomes final. . . .

Id. A certified mail receipt postcard reflected that Claimant received this communication but the portion reflecting the date of delivery was torn off. (DX 53).

According to a letter of Wednesday, September 24, 2003[4] from Claims Examiner McGuire, Claimant had submitted additional evidence by a communication sent on Tuesday, August 19, 2003 and received on Friday August 22, 2003. (DX 56). However, the evidence was returned along with the letter because the time frame for receipt of evidence expired on July 18, 2003. (DX 56). The letter further stated that if the claim was transferred to the Office of Administrative Law Judges, the Claimant or her representative would have the right to ask the judge to accept the evidence. *Id.*

In a letter dated Monday, September 22, 2003 and received on Wednesday, September 24, 2003, the pro se Claimant stated that she was protesting the decision on her husband's claim and would like to have a hearing in front of the Administrative Law Judge. (DX 57). The envelope in which the letter was sent does not appear in the Director's Exhibits.

In a letter of Thursday, September 25, 2003, Claims Examiner McGuire acknowledged receipt of the September 22, 2003 letter requesting a hearing (which he stated was postmarked on September 22, 2003 and received on September 24, 2003). (DX 58). The letter stated that the hearing request was untimely based upon the following:

> The proposed Decision and Order issued August 22, 2003 provided that, within 30 days after the date of issuance, and [sic] party may file a written request for a formal hearing. Your request for a hearing had to be filed by September 21, 2003. The request was mailed after that date and was filed (received by his office) on September 24, 2003. Accordingly, your request for a hearing is untimely and can not be considered.
>
> **If you disagree with this finding you may request a hearing, however, the only issue will be whether your request for a hearing was timely.**

Id. No time period for submission of the appeal was specified. The letter went on to explain that the additional evidence submitted had been returned but that it could be resubmitted in connection with a request for modification. *Id.* A certified mail receipt postcard reflected that Claimant received this communication on September 30, 2003. (DX 62).

By letter of Friday, October 24, 2003, filed on Monday, October 27, 2003, the Claimant stated that she wished to appeal the September 25, 2003 decision of the Claims Examiner. (DX 60).

[4] I take official notice of the calendar for 2003 and have added the applicable dates of the week where pertinent.

The case was transmitted for a hearing on January 22, 2004. (DX 65) The CM-1025 dated January 5, 2004 listed all contested issues, but under "Other Issues" stated the following, in pertinent part:

> **Other Issues. The first issue to be resolved:** The claimant filed timely request for a formal hearing.
>
> * * *

Id. The other issues are listed below.

A hearing in the above-captioned matter was held on March 31, 2005 in Princeton, West Virginia.[5] At the hearing, Director's Exhibit 1 through 67, Claimant's Exhibits 1 through 4, and Employer's Exhibit 1, 2, 5, 6, 8, 10, 11, and 12 were admitted into evidence. Employer's Exhibits 3, 4, 7, and 9 were rejected as exceeding the evidentiary limitations. (Tr. 23-24, 25-27, 35-39). Claimant Lodema Lester was the only witness to testify. (Tr. 27-34). The record closed at the end of the hearing but the parties were given 60 days (subject to extension if there were difficulty obtaining the transcript) to brief the issues, and particularly the timeliness of the claim and the applicability of res judicata/collateral estoppel.[6]

By counsel's letter of May 5, 2005, Employer requested on behalf of both parties that the issue of the timeliness of the hearing request be resolved prior to consideration of the claim on the merits. By letter of May 17, 2005, I accepted that proposal and directed that any briefs on that issue be submitted by June 17, 2005. Employer submitted a brief accompanied by a Motion to Dismiss on May 23, 2005 and Claimant submitted a brief on the timeliness of her request for a hearing on May 24, 2005.

In an "Order Denying Dismissal on Basis of Timeliness of Hearing Request, dated December 8, 2005, I found that the hearing request was timely and denied the motion to dismiss on that basis. That Order also required briefing or written closing arguments on the merits of this claim and related issues to be submitted within sixty days. Employer's Closing Argument, dated February 7, 2006, was filed on February 10, 2006. Claimant's Closing Argument was served on February 8, 2006 and filed on February 13, 2006. The case is now ready for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

As noted above, the threshold issue of "Timeliness" was resolved in an Order of December 8, 2005.

The remaining issues before the undersigned are as follows: the existence of pneumoconiosis, the causal relationship between pneumoconiosis and coal mine employment,

[5] See footnote 3 above.

[6] Also, I denied the Claimant's motion to compel the x-ray readings of physicians who were not being called as experts on a preliminary basis at the hearing, but I agreed to consider additional briefing on the issue.

and the causation of the miner's death.. (Tr. 25). Employer's counsel agreed to withdraw the issue of Survivor after hearing testimony on the issue and noted that a number of issues (listed under item 12) were primarily listed for appellate purposes. *Id.* In addition, the issue of whether collateral estoppel bars the relitigation of the issue concerning the existence of pneumoconiosis was also raised. (Tr. 5-8).

As they had before Judge Brenner, the parties stipulated to at least 15 years of coal mine employment; Claimant is asserting 21 years. (Tr. 24; DX 1).

Medical Evidence

The medical evidence submitted in connection with the instant survivor's claim and designated by the parties consists of the following:[7]

X-ray Evidence

Interpretations of chest X-rays that utilize the ILO system and have been designated by the parties are summarized below.[8]

Exhibit No./ Party designating	Date of X-ray/ Reading	Physician/ Qualifications[9]	Interpretation
DX 1 (DOL Exam)	04/17/1984/ 04/18/1984	M. Bassali BCR, B-Reader	Pneumoconiosis 1/1 profusion, type p/s, all lung zones. Quality 1.
EX 1 (Employer's Rebuttal)	04/17/1984 04/14/2004	J. Wiot BCR, B-Reader	Negative for pneumoconiosis. Quality 1
DX 1 (Claimant's Initial)	06/01/1988[10] 06/09/1988	E. Cappiello BCR, B-Reader	Pneumoconiosis 1/1, type p/q, all lung zones; "em" [emphysema]/ Quality 1.
DX 1 (Claimant's Initial)	06/01/1988 11/10/1988	S. Fisher BCR, B- Reader	Pneumoconiosis 1/2, type q/p, all lung zones; "em" [emphysema]. Quality 1.

[7] Evidence from the Miner's claim will only be discussed if designated by the parties.
[8] In addition to the x-ray readings listed in the table, x-ray interpretations that do not utilize the ILO system appear in the Miner's medical records and there were multiple readings of the April 17, 1984 and other x-rays in the Miner's claim. I have only listed the readings appearing in the evidence designations/summaries of the parties.
[9] BCR refers to a board certified radiologist. B-reader refers to a physician certified by NIOSH.
[10] In addition to the above, the Claimant designated two other readings of this x-ray (by Drs. Tristan and Ahmed) appearing in the Miner's Claim (DX 1) as rebuttal. However, as the Employer did not designate any readings of that x-ray, the readings by Drs. Tristan and Ahmed are not appropriate rebuttal evidence.

Exhibit No./ Party designating	Date of X-ray/ Reading	Physician/ Qualifications[9]	Interpretation
EX 8 (Employer's Initial)	08/25/2001 03/03/2005	J. Wiot BCR, B-Reader	Negative for pneumoconiosis; "ef" [effusion]; infiltrate RLL [right lower lobe]. Quality 2 [illegible CD].
EX 8 (Employer's Initial)	09/03/2001 03/03/2005	J. Wiot BCR, B-Reader	Negative for pneumoconiosis; "ef" [effusion]; infiltrate RLL [right lower lobe]. Quality 2 [disc CD].

Fifteen additional x-ray interpretations appear in the medical records, dating from March 2000 to September 2001 (DX 27-80, 32-42). For the most part these interpretations are positive for COPD or emphysema but they do not mention coal worker's pneumoconiosis or silicosis. (*Id.*) A September 18, 2001 interpretation mentions interstitial fibrosis. (DX 42).

Pulmonary Function Tests

The following pulmonary function tests were designated:

Exhibit No.	Date	Age/ Height	FEV1	FVC	MVV	FEV1/FVC
DX 1 DOL Exam	04/17/1984	54 68 inches	1.75 (pre)	3.26 (pre)	62	54 % (pre)
DX 1 Claimant's Initial	07/21/1988	58 68 inches	1.75 (pre) 1.79 (post)	3.08 (pre) 3.04 (post)	54 (pre) 68 (post)	57 % (pre) 59 % (post)
DX 26 Claimant's Initial	02/25/1997	55 72 inches	1.44 (pre)	2.83 (pre)	43 (pre)	51 % (pre)

An additional pulmonary function test for March 20, 1995 appears in the medical records along with Dr. Jabour's assessment of the results (DX 26).

Arterial Blood Gases

The following arterial blood gases were taken and designated, but the latter two are of questionable significances as they were taken during hospitalizations:

Exhibit No.	Date	pCO2	pO2
DX 1 DOL Exam	04/17/1984	40 (rest) 37 (exercise)	65 (rest) 74 (exercise)

Exhibit No.	Date	pCO2	pO2
DX 20 Claimant's Initial	08/22/2001	32.7 (rest)	41 (rest)
DX 21 Claimant's Initial	09/11/2001	55.8 (rest)	43 (rest)

Additional ABGs appear in the medical records.

Medical Opinions

Medical opinions rendered by four physicians were designated by the parties, in addition to those appearing in the medical records:

(1) **A. Dahhan, M.D.** (Employer's Initial) issued reports dated June 27, 2003 and January 26, 2005, in which he questioned the diagnosis of coal worker's pneumoconiosis, opined that the Miner was suffering from chronic obstructive pulmonary disease, determined that the Miner's death was due to COPD secondary to cigarette smoking and congestive heart failure due to coronary artery disease, and concluded that his death was not caused by, related to, contributed to, brought on or hastened by the inhalation of coal mine dust or coal worker's pneumoconiosis. (DX 51, EX 5). Dr. Dahhan also had his deposition taken on March 22, 2005. (EX 11).

(2) **Donald Rasmussen, M.D.** (DOL Exam, Claimant's Initial) examined the Miner for the Department of Labor on April 17, 1984 and issued a report for the Claimant on January 14, 2005. He determined on the first occasion that the Miner had coal worker's pneumoconiosis with a significant pulmonary impairment. (DX 1). In the more recent report, he opined that the Miner had severe chronic obstructive lung disease resulting from both his cigarette smoking and his coal mine dust exposure, and he opined that coal mine dust was a major contributing cause of the Miner's death. (DX 1, CX 1).

(3) **Robert Cohen, M.D.** (Claimant's initial) issued a report on March 8, 2005, in which he opined that the Miner suffered from severe obstructive disease with severe impairment in gas exchange from the combined effects of coal mine dust and smoking, and that the COPD hastened the Miner's death. (CX 2).

(4) **Gregory Fino, M.D.** (Employer's Initial) prepared a report dated July 14, 2003 and supplemental reports dated May 6, 2004 and February 15, 2005. Dr. Fino opined that there was insufficient evidence to justify a diagnosis of coal worker's pneumoconiosis, that a disabling respiratory impairment was present, that the Miner's death was due in part to lung disease combined with significant coronary artery disease with cardiomyopathy, that the lung disease was neither caused in whole or in part by the inhalation of coal mine dust, and that coal mine dust played no role in the Miner's death. (DX 50, EX 2, EX 6). Dr. Fino also had his deposition taken on March 28, 2005. (EX 12).

Death Certificate

The death certificate, signed by Marshall C. Long, D.O. as certifying physician, indicates that the Miner died on September 30, 2001, with the immediate cause of death "Respiratory failure" due to or as a consequence of "Arteriosclerotic coronary artery disease." (DX 9) "Occupational pneumoconiosis" was listed as another significant condition contributing to death but not resulting in the underlying cause. (*Id.*)

Other medical evidence

In addition to the above, medical evidence was submitted in connection with the claims that the Miner filed during his lifetime (DX 1), and medical records have also been submitted in connection with the instant claim. (DX 12-42).

The medical records include:

(1) records from hospitalizations at St. Luke's Hospital in June 2001 and September 2001, which list diagnoses of coronary artery disease, unstable angina pectoris, myocardial infarction by history, chronic obstructive pulmonary disease (COPD) or bronchitis, history of black lung, and coal worker's pneumoconiosis or post inflammatory fibrosis of the lungs (DX 12-14, 16-18, 21-23);

(2) records from Princeton Community Hospital from June to September 2001 including diagnoses of complicated pneumoconiosis, COPD, hypoxemia, cardiomyopathy, pneumoconiosis or black lung, emphysema, congestive heart failure, hypertensive heart disease, atrial fibrillation, and pneumonia (DX 19-20);

(3) office notes from E. Rhett Jabour, M.D. related to treatment in 1995 and during the period from August 1998 to September 2001, including diagnoses of severe COPD, bronchitis, emphysema, chronic heart failure, and atrial fibrillation (DX 10); and

(4) office notes from Marshall Long, D.O., for September 1998 to September 2001, reflecting diagnoses of CHF [chronic heart failure], COPD, atrial fibrillation, bronchitis, and emphysema. (DX 11).

Included in the hospital records is a CT scan report by Dr. Afzal U. Ahmed, M.D., relating to an August 23, 2001 CT scan. Extensive infiltrates in the right mid to lower lung field and pleural effusion bilaterally were noted together with atherosclerotic changes of the aorta and mild aneurysmal dilation of the aorta. The reading did not mention pneumoconiosis or fibrosis. (DX 31).

Interpretations of the CT scan taken on August 23, 2001 by Dr. Jerome Wiot and Dr. Cristopher Meyer are also of record. (EX 10). Both readings were designated by the Employer. Neither found any evidence of coal worker's pneumoconiosis on the CT scan although there were findings of apical emphysema and findings suggestive of bronchial pneumonia. (*Id.*)

Although, as discussed below, only one of the interpretations is admissible, and the other should therefore be stricken, exclusion of one of these interpretations would not be outcome determinative, as they reached compatible findings. Moreover, all of the CT scan evidence is negative for clinical pneumoconiosis so Claimant is not assisted by exclusion of one of these readings, nor is Employer prejudiced thereby. The latter of the two readings appearing in EX 10, by Dr. Wiot, is therefore **STRICKEN. SO ORDERED**.

The effect of the evidentiary limitations (appearing in the amended regulations) upon my consideration of the evidence is discussed further below.

Background and Employment History

Claimant is the widow of the deceased miner, Loris Lester. (DX 3). The Miner died on September 30, 2001 at the age of 71. *Id.* No autopsy was performed. *Id.* During the Miner's lifetime, he filed for black lung benefits on March 12, 1984 and was awarded benefits by Judge Lawrence Brenner's "Decision and Order Awarding Benefits" of April 25, 1991. (DX 1). No appeal was filed and the Miner was receiving benefits at the time of his death.

In connection with his claim, the Miner testified at a hearing before Judge Brenner conducted on August 31, 1990 in Pipestem, West Virginia. (DX 1; Transcript of August 31, 1990 Hearing). The Miner Loris Lester testified that he was born in March 1930 and that he had worked in the coal mines for 33 and one half years. (*Id.* at 7-9). He was last employed in September 1984 by Trace Fork Coal Company in Premiere, West Virginia, which is the same company as Royalty Smokeless, and his work involved roof bolting in the underground mines. (*Id.* at 9-10). He left because he had difficulty performing the work, due to shortness of breath and chest pain. (*Id.* at 10-11.) However, on cross examination he admitted that he worked until the mine shut down. (*Id.* at 15). He stated that his treating physician was Dr. Gary Carr, whom he had been seeing for six years, and Dr. Carr prescribed an inhaler and liquid medicine. (*Id.* at 11-12.) The Miner testified that he could no longer work in the mines due to his breathing problems alone. (*Id.* at 13.) On cross examination, the Miner admitted to smoking about one half pack of cigarettes daily from age 18 [1948] until he quit smoking in July 1988, as Dr. Abernathy recorded, but that he quit smoking four or five times during that period, up to one year at a time.[11] (*Id.* at 14-15, 19-22).

At the hearing before me, Claimant Lodema Lester testified that she and the Miner were married in 1958 and had two grown children. (Tr. 28-29). She recalled that at the time of his retirement from the mines in 1984, he was experiencing breathing problems. (Tr. 29). She recalled that he could not walk very far and that he could no longer perform a lot of activities, such as fishing, that he had previously enjoyed. (Tr. 29-30). He was in a wheelchair and a walker, and he could barely travel between the car and the house. (Tr. 30). His condition kept on worsening over the years, until he was on oxygen and had to use a Nebulizer two or three times per day to reduce the congestion. (*Id.*) When asked about his smoking history, Claimant

[11] In March 1995, Dr. Jabour recorded a smoking history of 40 years and noted that the Miner smoked "1 - 1/2 packs a day." (DX 10). In his April 17, 1984 DOL examination, Dr. Rasmussen recorded a smoking history of 3/4 packs per day for 36 years. (DX 1). There are various other inconsistent histories in the medical reports and hospital records.

testified that the Miner stopped smoking cigarettes in 1984, when he started chewing tobacco. (Tr. 31.) Prior to that, when he was still working six days per week, he smoked about one half pack per day because he could not smoke in the mines and chewed tobacco instead. (*Id.*) He also smoked when he was younger, and he may have smoked more than a half a pack daily at that time. (Tr. 32). She thought that he started smoking about age 18. (Tr. 32-33).

Discussion and Analysis

Timeliness of Hearing Request

The issue of the timeliness of the hearing address was resolved in my December 8, 2005 Order. I have reproduced the discussion portion below, for ease of reference:

> For the reasons set forth below, I find that the hearing request was timely, warranting consideration of this claim on the merits.
>
> The pertinent regulation appears at 20 C.F.R. §725.419, a provision that has not been amended in connection with the December 2000 revision of the regulations. Section 725.419 provides, in pertinent part:
>
> > (a) **Within 30 days** after the date of issuance of a proposed decision and order, **any party may, in writing, request** a revision of the proposed decision and order or a hearing. If a hearing is requested, the district director shall refer the claim to the Office of Administrative Law Judges (see§ 725.421).
> >
> > * * * *
> >
> > (d) **If no response** to a proposed decision and order **is sent** to the district director within the period described in paragraph (a) of this section, or if no response to a revised proposed decision and order is sent to the district director within the period described in paragraph (c) of this section, the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in § 725.310 [relating to modification].
>
> Based upon this section, Claimant makes two arguments. First, Claimant notes that section 725.419, in contrast to other provisions, requires that the response be "sent" within the prescribed period, not "filed", and that therefore the hearing request would be timely if timely mailed. Second, she argues that the appeal letter was timely mailed on September 22, because the period ended on a

Sunday (September 21, 2003) so the next business day (September 22, 2003) was applicable, pursuant to 20 C.F.R. § 725.311(c).[12] I agree.

In Employer's motion and supporting memorandum, Employer relies upon a line of authority relating to computation of filing dates and the absence of provisions providing additional time for mailing in the applicable sections. However, I find that this authority is inapposite because the plain language of section 725.419 requires that the response be "sent," not "filed."

In finding a hearing request to be untimely under section 725.419 and therefore dismissing the hearing request, Associate Chief Administrative Law Judge Thomas Burke looked to the postmark date in determining when the hearing request was "sent." *Lonnie D. Ross v. Shamrock Coal Company, Inc.,* Case No. 2004-BLA-05937 (ALJ June 4, 2004). In that case, Judge Burke found that the time period was jurisdictional and not subject to extension for good cause, pursuant to 20 C.F.R. §725.423. Based upon the postmark on the envelope, Judge Burke found that the request was untimely as it was postmarked four days after the expiration of the 30-day time limit.

Here, there is no envelope in the Director's Exhibits, but Claims Examiner McGuire stated that the September 22, 2003 letter requesting a hearing was postmarked on September 22, 2003. (DX 58). Thus, the request was "sent" on September 22, 2003, in accordance with section 725.419. It was also timely under section 725.311 (c) because the time period ended on a Sunday and was therefore extended to the next business day.

Administrative Law Judge Jennifer Gee had occasion to consider section 725.311(c) as applied to section 725.419(a) in denying reconsideration of her approval of a withdrawal request in *Montez v. RAG American Coal Company,* Case No. 2004-BLA-5827 (ALJ October 27, 2004). Judge Gee rejected the Employer's argument that she lacked the authority to approve the withdrawal request because the hearing request was untimely under section 725.423 as it was filed on December 29, 2003, 31 days after the November 28, 2003 decision by the district director. Judge Gee found an exception under section 725.311(c), because December 28, 2003 fell on a Sunday, thereby extending the deadline until the next business day, Monday, December 29, 2003. In so holding, Judge Gee used the filing date but, in a footnote, she rejected the argument that the hearing request had to be "received" within 30 days because section 725.419(a) "merely requires that the request be made" and "does not specifically require that the request be received within 30 days of the date of the District Director's decision." *Montez* at note 1.

For the same reasons, I find the hearing request here to be timely. Under section 725.419(a), it had to be sent within 30 days of the district director's

[12] Section 725.311(c) provides that the last day of a prescribed period will be included unless it is a Saturday, Sunday or legal holiday, in which case the period extends to the next day.

decision, but, because the 30-day period ended on a Sunday, the request had to be sent out by Monday, September 22, 2003. The hearing request was therefore timely and the Employer's motion to dismiss is denied.

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001, including survivor's claims. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3)*, citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; s*ee* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Further, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. However, the Board found that records from a state claim were properly excluded as they did not fall within the exception for hospitalization or treatment records or the exception for prior federal black lung claim evidence (under 20 C.F.R. §725.309(d)(1)). *Dempsey* at 6. On the issue of good cause for waiver of the regulations, the Board noted that a finding of relevancy would not constitute good cause and therefore records in

excess of the limitations offered on that basis, and on the basis that the excluded evidence would be "helpful and necessary" for the reviewing physicians to make an accurate diagnosis, were properly excluded. *Id.* at 6. Finally, the Board stated that inasmuch as the regulations do not specify what is to be done with a medical report that references inadmissible evidence, it was not an abuse of discretion to decline to consider an opinion that was "inextricably intertwined" with excluded evidence. *Id*. at 9. Referencing *Peabody Coal Co. v. Durbin,* 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), the Board acknowledged that it was adopting a rule contrary to the common law rule allowing inadmissible evidence to be considered by a medical expert, because "[t]he revised regulations limit the scope of expert testimony to admissible evidence." *Dempsey* at 9-11.

In *Webber v. Peabody Coal Co,* 23 B.L.R. 1-__, BRB No. 05-0335 BLA (Jan. 27, 2006)(en banc), the Board changed the position that it took in *Dempsey* with respect to CT scan evidence and adopted the Director's position that "the use of singular phrasing in 20 C.F.R. § 718.107" requires "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence." Thus, as discussed above, one of the CT scan readings designated by the Employer (Dr. Wiot's reading in EX 10) has been STRICKEN.

As the Board noted in *Dempsey*, the regulations specifically allow evidence from a prior claim to be considered in connection with a later claim, so that a determination may be made whether there has been a material change in conditions since the time of the prior claim. 20 C.F.R. §725.309(d)(1). However, there is no such provision applicable to survivor's claims that would allow consideration of the evidence developed in the miner's claims, absent a finding of good cause.

Consistent with the above limitations and the Board's decision in *Dempsey*, other administrative law judges have generally excluded evidence developed in connection with a miner's claim from consideration in a surviving spouse's claim to the extent that the limitations have been exceeded. *See Brewster v. Consolidation Coal Co.,* 2004-BLA-05361 (ALJ Solomon Feb. 16, 2005) (finding evidence from miner's claim unduly repetitious and finding no good cause to exceed limitations); *Duncan v. West Coal Corp.*, 2004-BLA-05355 (ALJ Miller Jan. 18, 2005) (noting strong policy reasons for excluding evidence from a miner's claim in a survivor's claim, which is "an independent claim subject to independent analysis"); *Howard v. P & C Mining Co.,* 2003-BLA-05436 (ALJ Kane Dec. 29, 2004) (excluding excess evidence except for treatment records and prohibiting rebuttal to treatment records); *Griffin v. Island Coal Company,* 2003-BLA-5503 (ALJ Phalen July 22, 2004) (excluding excess reports, excess test results, and deposition testimony relying upon inadmissible evidence). However, Administrative Law Judge Robert L. Hillyard found good cause for consolidating a miner's claim with a survivor's claim and for exceeding the evidentiary limitations in the consolidated claims, in *Clark v. Peabody Coal Company,* 2002-BLA-05114 (ALJ Hillyard, Nov. 30, 2004).

In view of the authority cited above, I will not consider the evidence from the Miner's claim (appearing in DX 1) with respect to each category of evidence for which there are limitations. As I address the issues presented in this decision, I will decide whether special circumstances exist that give rise to good cause for consideration of evidence from the Miner's claim. As noted above, although designated by the Claimant, I cannot consider the x-ray

readings of Drs. Tristan and Ahmed relating to a June 1, 1988 x-ray, appearing in the Miner's claim, because it is not proper rebuttal evidence and Claimant has already designated her two x-ray readings.

In addition to the above, medical reports and deposition transcripts, while not exceeding the evidentiary limitations, reference evidence that is not otherwise admissible, contrary to section 718.414. Both subsection (a)(2)(i) (relating to evidence admissible on behalf of a claimant) and (a)(3)(i) (relating to evidence admissible on behalf of a responsible operator) provide the following:

> . . . Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph [providing the limitations] or paragraph (a)(4) of this section [allowing admission of "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease" notwithstanding the limitations in (a)(2) and (a)(3)]. . . .

As *Dempsey* noted, the section does not state what is to be done with a medical report that is not in compliance with this requirement and it would be within my discretion to exclude such a report if the physician's opinion were "inexplicably intertwined" with the inadmissible evidence. Accordingly, I will consider the extent to which the impermissible evidence is inextricably intertwined with the expert's medical opinion (whether stated in a report or at a deposition) when addressing the merits of the claim.

Collateral Estoppel

Claimant contends that the doctrine of collateral estoppel bars the relitigation of the issue of the existence of pneumoconiosis, because an administrative law judge (Judge Brenner) made a finding regarding the existence of the disease as a part of the living miner's claim. (Claimant's Closing Argument at 4-7). Claimant argues that the criteria for issue preclusion are applicable and distinguishes the decision of the Benefits Review Board in *Collins v. Pond Creek Mining Co.,* 22 BLR 1-20 (Ben. Rev. Bd. Jan. 28, 2003), which found collateral estoppel to be inapplicable to a prior finding of pneumoconiosis due to the change in law under *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 211 (4th Cir. 2000). Claimant argues that Judge Brenner made findings of pneumoconiosis based both upon x-rays and medical opinions so the change in law under *Compton* is not relevant. (*Id.*) Alternately, Claimant seeks issue preclusion on Judge Brenner's finding of clinical pneumoconiosis based upon the x-ray evidence. (*Id.* at 8.)

In its Closing Argument, Employer, relying on *Collins* and the unpublished Fourth Circuit decision in *Howard v. Valley Camp Coal,* 94 Fed. Appx.. 170 (4th Cir. 2004), argues that collateral estoppel is inapplicable here because the issue of whether the existence of pneumoconiosis was established in the survivor's claim is not identical to the one previously litigated in the Miner's claim. (Employer's Closing Argument at 3-4.) As to Claimant's alternative argument, Employer argues that what the weight of the x-ray evidence showed was

not an "issue" but was, rather, a factual finding and that finding was not a critical and necessary part of Judge Brenner's decision. (*Id.* at 4-5.) I agree.

Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Ramsey v. INS,* 14 F.3d 206 (4th Cir. 1994); *see Virginia Hosp. Ass'n v. Baliles,* 830 F.2d 1308 (4th Cir. 1987). For collateral estoppel to apply in the present case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the claimant must establish that:

(1) the issue sought to be precluded is identical to one previously litigated;
(2) the issue was actually determined in the prior proceeding;
(3) the issue was a critical and necessary part of the judgment in the prior proceeding;
(4) the prior judgment is final and valid; and
(5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

Additionally, it is well-settled that relitigation of an issue is not barred when there is a difference in the allocation of the burdens of proof and production, or a difference in the substantive legal standards pertaining to the two proceedings. *Smith v. Sea B Mining Co.,* BRB No. 04-0230 BLA (Nov.30, 2004) (unpub.), *citing Collins v. Pond Creek Mining Co.,* 22 BLR 1-229, 1-232 (2003).

The Board has held that a prior finding of pneumoconiosis before the establishment of the *Compton* standard is not identical for the purposes of collateral estoppel to current findings of pneumoconiosis due to the change in the standard of proof. *Surway v. United Pocahontas Coal Co.*, BRB No. 01-0881 BLA (Jun. 26, 2002) (unpub.). In *Island Creek Coal Co. v. Compton*, 211 F.3d 302, (4th Cir. 2000), the Fourth Circuit held that based upon the statutory language at 30 U.S.C. §923(b), all relevant evidence is to be considered together rather than merely within discrete subsections of 20 C.F.R. §718.202 (a)(1)-(4) in determining whether a claimant has met his or her burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence. Before this holding, the Board's precedent stood for the proposition that a claimant could prove pneumoconiosis under one of the four methods pursuant to Section 718.202 (a)(1)-(4) obviating the need to provide proof under all four categories. *See Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985); *see also Surway v. United Pocahontas Coal Co.*, BRB No. 01-0881 BLA (Jun. 26, 2002) (unpub.). In this case, Judge Brenner's finding was issued prior to the *Compton* decision. Moreover, even if the change is not of significance in the instant case, as Claimant argues, there were other changes in the law since the time of Judge Brenner's decision based upon the new regulations, which restrict the amount of admissible evidence and change the definition of pneumoconiosis (as discussed infra.) These changes could affect the outcome of a claim. Therefore, the issue is not identical due to the change in law.

Inasmuch as the prerequisite for application of the doctrine of collateral estoppel is not met, collateral estoppel does not apply. Hence, the prior finding of pneumoconiosis in the living miner's claim is not binding in this proceeding, and the existence of pneumoconiosis must be proven by the Claimant by the preponderance of evidence.

Merits of the Claim

Since this survivor's claim was filed after January 1, 1982, the issue of death due to pneumoconiosis is governed by 20 C.F.R. § 718.205(c). As amended, that subsection provides:

> (c) For the purpose of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:
>
> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
>
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> (3) Where the presumption set forth at § 718.304 [relating to complicated pneumoconiosis] is applicable.
>
> (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
>
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. [Emphasis added.]

20 C.F.R. § 718.205(c) (2001). Subsection (5) was added when the regulations were amended. Under existing precedent in the Fourth Circuit (and elsewhere), consistent with new subsection (5), any condition which hastens a miner's death is a substantially contributing cause of death. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 757-62 (4th Cir. 1999); *Shuff v. Cedar Coal Co*., 967 F.2d 977 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). *See also Northern Coal Company v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 B.L.R. 2334 (10th Cir. 1996); *Brown v. Rock Creek Mining Company, Inc.*, 996 F.2d 812, 816 (6th Cir. 1993); *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 1099 (4th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3rd Cir. 1989). Thus, the standards are the same under the new and old regulations.

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in

order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. As amended in December 2000, this definition includes both medical or clinical pneumoconiosis and statutory or legal pneumoconiosis. 20 C.F.R. §718.201. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e*. the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. *Id*. Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, and the definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.* As amended, the regulation provides that a lung disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Notably, in amending the regulations, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual's case. *Id.* at 79938.

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986).

Under 20 C.F.R. §718.202(a)(1)-(4), a finding of pneumoconiosis can be made based upon x-ray evidence, biopsy or autopsy evidence, presumption, or the reasoned medical opinion of a physician based on objective medical evidence.

X-Ray Evidence. Claimant has not established pneumoconiosis by a preponderance of the x-ray evidence submitted in connection with the claim. The designated x-ray evidence is summarized above. Of the six designated x-ray readings that utilize the ILO system, three are positive for pneumoconiosis and three are negative for pneumoconiosis. *See* 20 C.F.R. § 718.102. All of those readings were by the most qualified readers. Thus, if I merely count the readings, they are in equipoise, and Claimant cannot prevail. In addition, while the April 1984 x-ray was interpreted as positive by one reader and negative by another reader, and the June 1988 x-ray was interpreted as positive for pneumoconiosis, the readings of the most recent x-rays (taken in August 2001 and September 2001) were negative for pneumoconiosis. There is no basis for assigning additional weight to the earlier x-rays in view of the progressive nature of the disease. Furthermore, while not in compliance with the regulatory standards, the x-rays taken

during the hospitalizations do not support a finding of pneumoconiosis. Thus, Claimant has failed to meet the preponderance of the evidence standard in establishing pneumoconiosis, and Claimant cannot prevail under 20 C.F.R. §718.202(a)(1).

Autopsy or Biopsy Evidence. As there is no autopsy or biopsy evidence of record, Claimant has failed to establish the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. There is no x-ray evidence of complicated pneumoconiosis or reasoned medical opinion establishing complicated pneumoconiosis. The only evidence of pneumoconiosis is a reference to such in the Discharge Summary by Vishnu Patel, M.D., in the Princeton Hospital records for August to September 2001, and that reference is unsupported by any clinical data or articulated rationale and does not describe the size of the lesions or what they would be expected to show on x-rays. *See Braenovich v. Cannelton Industries, Inc.*, 22 B.L.R. 1-237 (2003) (requiring equivalency determination to be made.) *See also Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc). As there is no other evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, *inter alia*, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the miner did not die on or before March 1, 1978. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. I find that the medical opinion evidence does not, by a preponderance of the evidence, establish pneumoconiosis. As summarized above, medical opinions were issued by Drs. Dahhan, Rasmussen, Cohen, and Fino. Drs. Dahhan and Fino found that the Miner did not suffer from either clinical or legal pneumoconiosis while Drs. Rasmussen and Cohen found that the Miner's COPD was caused in significant part by coal mine dust exposure. Although Drs. Dahhan and Fino agreed that the Miner suffered from COPD, they attributed it entirely to the effects of cigarette smoking.

At the outset, I will consider the medical reports and depositions of Drs. Dahhan, Rasmussen, Cohen, and Fino in their entirety, provided that the otherwise inadmissible portions of their reports will be stricken, to the extent not inextricably intertwined with the opinions and not necessary for an understanding of these physicians' opinions.[13] However, in considering the opinions of these physicians, I will not in any way rely upon evidence recounted in their reports or at their depositions that is not admissible except to the extent that it is incorporated in these physicians' conclusions.[14]

Factors to be considered when evaluating medical opinions include the reasoning employed by the physicians and the physicians' credentials. *See Millburn Colliery Co. v. Hicks,*

[13] This matter is discussed above in the section relating to Evidentiary Limitations.

[14] As the Board noted in *Dempsey*, *supra* (slip op. at 9-10), citing *Peabody Coal Co. v. Durbin,* 165 F.3d 1126 (7th Cir. 1999), it is perfectly proper for expert witnesses to consider inadmissible evidence and they are only precluded from doing so because the revised regulations limit the scope of expert testimony to admissible evidence.

138 F.3d 524, 536 (4th Cir.1998). A doctor's opinion that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 BLR 1-19, 1-22 (BRB 1987) (stating that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and that a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions). In addition, the new regulation appearing at 20 C.F.R. §718.104(d) allows additional weight to be given to the opinion of a treating physician but requires certain factors, including the nature and duration of the relationship, the frequency of treatment, and the extent of treatment, to be considered.

All four physicians are highly qualified to express opinions on the issue of the etiology and nature of the Miner's lung disease, based upon the impressive credentials on their curricula vitae, and I find them to be equally qualified. Three of the physicians (Drs. Dahhan, Cohen, and Fino) are board-certified pulmonologists. Dr. Rasmussen is a board certified internist, and although he lacks the additional board certification in the subspecialty of pulmonary diseases, I do not find the lack of that credential to be of any significance in view of his extensive experience in treating pulmonary diseases. In addition, each of these physicians is qualified as a B-reader and is qualified to interpret pulmonary x-rays.

In considering all of these opinions, I must conclude that none of the physicians have stated with reasonable medical certainty that the Miner suffered from clinical pneumoconiosis (i.e., coal worker's pneumoconiosis or silicosis, or a similar fibrotic condition of the lungs). Claimant has not therefore established clinical pneumoconiosis.

On the issue of legal pneumoconiosis, the reviewing physicians disagree as to whether the Miner suffered from legal pneumoconiosis in the form of chronic obstructive pulmonary disease caused in significant part by coal mine dust exposure. Drs. Dahhan and Fino did not feel that there was any objective evidence that the Miner's coal mine dust exposure contributed to his chronic obstructive pulmonary disease, which they found to be attributable to cigarette smoking alone, and Drs. Cohen and Rasmussen opined that the Miner's chronic obstructive pulmonary disease was due to the combined effects of cigarette smoking and coal mine dust exposure. I have carefully reviewed the opinions of these physicians and I find the opinions of Drs. Cohen and Rasmussen to be particularly persuasive in their discussion of the epidemiological evidence. However, the issue here is not whether coal mine dust more likely than not contributes to COPD in smoking miners. Rather, the issue is whether the Claimant has proven by a preponderance of the evidence that it did so in this case, under the new regulatory standards. Drs. Cohen and Rasmussen have not pointed to any case specific evidence supporting such an association and they have taken the position that the etiologies of cigarette smoking and coal mine dust exposure cannot be separated out. On the other hand, Drs. Dahhan and Fino have taken the position that the Miner's presentation of symptoms and test results is more consistent with a cigarette-smoke induced pulmonary impairment. In particular, Dr. Fino, while acknowledging the likelihood of a minimal loss of FEV1 in miners with the degree of exposure that the Miner had in the instant case, pointed to the lack of dust deposition on the x-rays as making it unlikely that any such loss would be of clinical significance. Therefore, the COPD may not be deemed to be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" under Dr.

Fino's analysis. Inasmuch as Drs. Rasmussen and Cohen cannot point to any case-specific evidence suggesting otherwise, I find Dr. Fino's analysis to be persuasive. Accordingly, I find that the medical opinion evidence does not support a finding of legal pneumoconiosis either and Claimant has failed to meet her burden of proof under 20 C.F.R. §718.202(a)(4).

Other Evidence of Pneumoconiosis. There is additional medical evidence, consisting of CT scan interpretations, a death certificate, and hospital records, relevant to the issue of pneumoconiosis. All of this additional evidence was thoroughly considered.

Overall, I do not find that the additional medical evidence in this case supports a finding of either clinical or legal pneumoconiosis. The CT scan evidence tends to negate a finding of clinical pneumoconiosis, but does not assist me in resolving the issue of legal pneumoconiosis, and the hospital and medical records add little to the established diagnosis of COPD without addressing its etiology. The recitation of historical diagnoses of "black lung" or "pneumoconiosis" in the medical records is devoid of analysis and entitled to little weight. Similarly, the death certificate mentions occupational pneumoconiosis as a causative agent, but it is conclusory in nature and is entitled to little weight.

All Evidence on Pneumoconiosis. In considering all of the admissible medical evidence, favorable and unfavorable, I find that the evidence fails to establish the presence of pneumoconiosis under any of the individual subsections of section 718.202(a) or under the section as a whole, under *Compton*. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis that may be considered, given the evidentiary limitations, I find that the Claimant cannot establish that the Miner had either clinical or legal pneumoconiosis as defined by the regulations, as amended.

CONCLUSION

Inasmuch as the Claimant cannot establish the presence of pneumoconiosis, this claim fails because a requisite condition of entitlement has not been met. A separate discussion and analysis of the remaining issues raised in this claim is therefore unnecessary.

ORDER

IT IS HEREBY ORDERED that the claim of Lodema Lester for black lung benefits be, and hereby is, **DENIED.**

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to the Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).